No. 86 1703

Supreme Court, U.S.
FILED
APR 21 1987
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

October Term, 1987

KENNETH LANCASTER,

Petitioner,

vs.

BUERKLE BUICK HONDA CO.

Respondent.

Petition for a Writ of Certiorari
to the United States Supreme Court
From the Eighth Circuit Court of Appeals

PETITION FOR CERTIORARI

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QUESTION PRESENTED

I.

Whether the validity of waivers by Older Employees, of their rights under the Age Discrimination in Employment Act of 1967, are governed by the provisions of the Fair Labor Standards' Act, FLSA, 29 USC §216, the standards applied in Title VII cases, or by ordinary contract principles applied to agreements in general.

PARTIES TO THE PROCEEDING

Petitioner:

Kenneth Lancaster

Respondent:

Buerkle Buick Honda Co.

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No._____

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Petition for a Writ of Certiorari
to the United States Supreme Court
From the Eighth Circuit Court of Appeals

Petition for Certiorari

Petitioner Kenneth Lancaster prays that a writ of **certiorari** be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this proceeding.

Opinions Below

The opinion of the Court of Appeals affirming the order of the District Court is reported in No. 86-5020-MN (8th Cir. Jan. 21, 1987) 42 F.E.P. Cases (BNA) 1472, 809 F.2d

539 (8th Cir. 1987). It appears in Appendix A to this petition. The opinion of the United States District Court for the District of Minnesota is Reported in Civ. No. 4-84-1060 (Dist. Minn. Nov. 27, 1985). It appears in Appendix B to this petition.

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on January 21, 1987. This petition is filed within ninety days thereof. The jurisdiction of this court is invoked pursuant to 28 U.S.C.§1254 (1).

Statutes Involved

The following sections of the Age Discrimination In Employment Act of 1967, 29 U.S.C.§§621-634 (hereinafter referred to as the "ADEA"), and in the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§201-262 (hereinafter referred to as "FLSA") are involved in this case:

ADEA, § 7(b) 29 U.S.C. § 626(b), which provides in part:

> The provisions of this Act shall be enforced in accordance with the powers, remedies and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217)...

FLSA § 16(c), 29 U.S.C. § 216(c):

> The secretary is authorized to supervise the payment of the unpaid minimum wages or the overtime compensation owing to an employee or employees under

§ 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a Waiver by such employee of any rights he may have under Subsection B of this Section for such unpaid minimum wages or unpaid overtime compensation and additional equal amount as liquidated damages.

A. Facts

Petitioner, Kenneth Lancaster, had been induced to leave a good position with General Motors by Buerkle when he was first hired. At the age of 53 he was terminated without any prior notice at the close of his working day on Friday, December 30, 1983, after 13 years as a service manager with Buerkle, and one year before his retirement benefit was fully vested. His position was subsequently filled by a new employee who was 28 years old. Immediately after Petitioner was informed of his termination, Respondent handed Petitioner an agreement (prepared by Respondent's lawyer) for Petitioner's signature that offered Petitioner 6 months severance pay and continued life insurance. The agreement contained a clause releasing Respondent from any and all claims Petitioner might have arising from the termination. Petitioner attempted to discuss the termination with Respondent and asked for time to review the agreement at that time or over the New Year's holiday weekend. Petitioner's repeated requests were denied.

After the holiday weekend, Respondent's general manager went to Petitioner's home and presented Petitioner with a letter offering one year of severance pay. The general manager told the Petitioner that he had no choice but to sign the agreement in order to obtain the severance

pay. Petitioner signed the letter at that time without any advice from legal counsel.[1]

B. Proceedings Below

Petitioner filed a complaint and demand for jury trial in the United States District Court of Minnesota, Third Division in October, 1984, alleging violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (ADEA), Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA), Employee Retirement Income Security Act, (ERISA), 29 U.S.C. § 2001 *et seq.*, and other claims including promissory estoppel. Respondent filed a Motion for Summary Judgment arguing that the release agreement barred Petitioner's suit. Petitioner argued that the release agreement was invalid and that it was obtained in violation of the ADEA's procedures, and was an unknowing and involuntary waiver. Petitioner further argued that there existed a genuine question of material fact as to whether the waiver was valid which precluded summary judgment.

The District Court granted Respondent's Motion for Summary Judgment finding the release valid under state contract law. Although the gravamen of Petitioner's complaint was a claim for relief under the ADEA, the District Court tersely dismissed the applicability of the ADEA.

On appeal, the Eighth Circuit affirmed rejecting the ADEA and setting the procedures for obtaining waivers and applying ordinary contract analyses to find the release agreement valid. The Eighth Circuit's decision acknowledges that the ADEA incorporates the enforce-

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[1]Petitioner did not attempt to find an attorney on the day following the New Year's Eve holidays who could advise him, because he believed it would be unlikely that he could locate an attorney on such short notice at that time. Further, he was not allowed to have the document containing the waiver until he signed it.

ment provisions of the Fair Labor Standards Act, FLSA, 29 U.S.C. § 216, but dismisses the incorporation of FLSA case law which has prohibited waivers of rights through private releases. (Ap. Ct. Op. at Appendix 2a). The Eighth Circuit also rejected Petitioner's claims that the release agreement did not bar Petitioner's claims because the agreement failed to specify the releases of claims under the ADEA, or any discrimination laws. Furthermore, the Eighth Circuit determined that Plaintiff had knowingly and voluntarily released his rights, under ordinary contract principles. Consequently, the Eighth Circuit Court of Appeals upheld the validity of the release agreement waiving Petitioner's ADEA rights and barring his right to sue on all and any employment-related claims.

Reasons for Granting the Writ

I. The Standard for Determiningg the Validity of Waivers of Older Workers' Rights Under ADEA is an Important Question of Law Which This Court Has Not Resolved.

The legal issue here submitted for this court's consideration is what shall be the standard for determining the legality of a waiver of the statutory rights under the Age Discrimination in Employment Act of 1967, "ADEA", 29 U.S.C. § 621 *et seq.* The ADEA in § 626(b) incorporated § 16(c) of the Fair Labor Standards Act of 1938, "FLSA" which specifically sets forth the procedure by which a waiver would bar subsequent suit:

> "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the overtime compensation owing to an employee or employees under § 6 or 7 of this Act, and the agreement of any

> any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any rights he may have under Subsection B of this Section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages."

Under § 16(c) of the FLSA, a waiver of rights is valid if supervised by the agency charged with administration and enforcement of the Act. Thus, the statute itself provides a standard for determining the validity of a waiver of rights.

The Eighth Circuit's decision below considers various standards in determining whether the waiver of Petitioner's ADEA's rights was valid, but does not mention or apparently even consider § 16(c) of the FLSA. The court below briefly discusses then clearly rejects the standard applied by this court to general waivers of rights under the FLSA. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 114 (1946); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945). Finally, although the Eighth Circuit purports to rely on the voluntary and knowing standard utilized in Title VII cases, it appears to apply another standard based solely on ordinary contract principles. In so doing, the decision below creates confusion as to the proper standard and burden of proof applicable to ADEA waivers. Consequently, Supreme Court review is necessary to clarify the proper standard applied to waivers under the ADEA.

In enacting the ADEA, Congress selectively incorporated the enforcement provisions of the FLSA:

> "The provisions of this Act shall be enforced in accordance with the powers, remedies and procedures

> in §11(b), 16 (except for subsection (a) thereof) and 17 of the Fair Labor Standards Act of 1938, and subsection (c) of this section ... Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wage and overtime compensation for purposes of Section 16 & 17 of the FLSA: Provided that liquidated damages shall be payable only in cases of willful violations of the Act ..." 29 U.S.C. §626 (b).

In *Lorillard vs. Pons,* 434 U.S. 575 (1978) the Supreme Court interpreted §626(b) and the extent of ADEA incorporation of FLSA decision law on the issue of whether a plaintiff has a right to jury trial in ADEA actions stating on page 581:

> "...in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation."

The Court made note of, "Congress' desire to use an existing statutory scheme ... and, on the other hand, it's dissatisfaction with some elements of each of the preexisting schemes." at 578.

Neither the FLSA nor the ADEA provide specifically for the right to a jury trial, Yet the Court concluded that ADEA litigants have the right based on court decisions interpreting the FLSA. Thus, the Court incorporated into the ADEA, judicial doctrine interpreting the FLSA:

> "Long before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions pursuant to the FLSA. Indeed, every court to consider the issue had so held. Congress is presumed to be aware of an administrative or judicial

> interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute . . ."

at 580-81 (citations and footnot omitted).

In a similar vein, neither the FLSA nor the ADEA address the issue of whether an employee may waive his statutory rights. However, under FLSA case law an employee's right to minimum wages, overtime compensation and liquidated damages is non-waivable. In *Barrentine vs. Arkansas-Best Freight Systems,* 450 U.S. 728, at 740 (1981) the Supreme Court having before it the issue of whether an employee's FLSA rights may be waived through a colective bargaining agreement, clearly enuciates this rule:

> "This Court's decisions interpreting the FLSA have frequently emphasized the non-waivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. *Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived . . .* " (emphasis ours) at 740.

Even the dissenting opinion in Barrentine recognized the law on this subject at 746:

> "I agree, of course, that the Congressionally created right of individual workers to a minimum wage under §6 of the F.L.S.A., 29 U.S.C. §206, may not be waived through a collective bargaining agreement between an employer and the worker's union or through a direct agreement between an individual worker and the employer."

A typical post *Barrentine* lower court FLSA case is *Lynn's Food Stores, Inc. v. U.S.A.*, 679 F.2d 1350, at 1355 (11th Cir. 1982) where the Eleventh Circuit, citing *Barrentine,* held that a settlement agreement between employees and their employer under the FLSA was invalid, because it was not supervised by the Department of Labor or a court:

> "Other than a Section 216 (c) payment supervised by the Department of Labor, there is only one context in which compromises of FLSA back wage or liquidated damage claims may be allowed: a stipulated judgment entered by a court which has determined that a settlement proposed by an employer and employees, in a suit brought by the employees under the FLSA, is a fair and reasonable resolution of a bona fide dispute over FLSA provisions."

In the recent case of *Tony and Susan Alamo Foundation, et. al., vs. Secretary of Labor,* 471 U.S. 290 (1985) in which it was the employees who wished to assert the waiver by disclaiming coverage under FLSA the Supreme Court once again confirmed its earlier holdings that without supervision, employees may never waive the protection under the Act:

> "That the associates themselves vehemently protest coverage under the Act makes this case unusual, but the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to *use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act."* (emphasis ours)

Both *Barrentine* and *Alamo Foundation* based their holdings on *Brooklyn Savings Bank vs. O'Neil,* 324 U.S. 697 (1945). *Brooklyn Savings* was the first Supreme Court decision to establish that the right to *minimum wages and overtime compensation* was non-waivable in suits arising under the FLSA:

> "Neither petitioner nor respondent suggest that the right to the basic statutory *minimum wage* could be waived by any employee subject to the Act. No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act." (emphasis ours) at 707.

As has already been noted, Section 626(b) of the ADEA states that, "Amounts owing to a person as a result of a violation of this Act shall be deemed to be *unpaid minimum wages or unpaid overtime compensation* for purposes of §16 & 17 of the FLSA." (emphasis ours). Thus an employee *may not waive* his statutory rights under the ADEA.

The facts in *Brooklyn Savings* involved an employer who had obtained a release from its employee in an amount less than the employee's full FLSA entitlement. The Supreme Court held that a private, unsupervised release was invalid under the FLSA when there was no bona fide dispute as to liability, stating at 704:

> "The issue presented in No. 445 therefore is whether in the absence of a bona fide dispute between the parties as to liability, respondent's written waiver of his right to liquidated damages under §16(b) bars a subsequent action to recover liquidated damages. We are of the opinion that it does not bar such a claim."

Even if it may be argued by respondent that the facts in Lancaster's case are in dispute, the rule of no waiver

would still apply because in *Schulti vs. Gangi,* 328 U.S. 108 (1946) the Supreme Court explicitly addressed the question left open in *Brooklyn Savings:*

> "...we granted certiorari in order to determine the issue which was not passed upon in *Brooklyn Savings vs. O'Neill...*"

Gangi held that a private, unsupervised release was invalid when there *was* a bona fide dispute as to liability. The liability dispute was whether employees were covered by the Act:

> "We think the purposes of the Act ... leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage." *Gangi* at 116.

Thus under both the *Brooklyn Savings* and *Gangi* line of cases dealing with the statutory rights of employees a waiver obtained by the Employer is not a bar to a private suit.

However, as has been previously discussed, the Supreme Court, in *Barrentine* and *Alamo Foundation* has more recently held that it does not consider *any* private, unsupervised release valid under the FLSA. These cases, along with the clear language in *Brooklyn Savings* concerning the absolute non-waivability of the right to *minimum wages* should leave no doubt that an unsupervised waiver of statutory rights under the ADEA is no bar to a private suit.

II. The Purported Waiver Fails To Meet Standards Required By This Court Under Title VII Cases Because It Contains No Express Waiver Of The Petitioner's Claim Under The ADEA.

Our Minnesota District Court in *Strand et al vs. Garden Valley Telephone Company,* 51 F. Supp. 898 (D.C. Minn.1943) has long recognized:

> "An employee under the Fair Labor Standards of 1938 may not bargain away such rights as are given by the Act. The right to damages for failure on the part of the employer to pay an employee the minimum wage is mandatory and does not become a matter of discretion for the courts, nor a matter of agreement between parties. To hold otherwise would be an abortion of the intent of Congress, defeat in part the purposes for which the Act was passed, and open the way to injustice, if not fraud..." at 904.

But even if such rights could be waived the Court went on the state:

> "...*I think* this Defendant *might* have been able to settle or compromise such honest dispute ... The facts with reference to such compromise to settlement must, however, be a clear-cut and definite. There must be a final meeting of the minds upon the compromise, with *full understanding of the dispute and the effect of the compromise.* at 905.

In reviewing the circumstance upon which the "release was taken from the Petitioner, he was not in a position to have, or even fairly offered the opportunity to have either a full understanding of his claims or realize the effect of his release.

Lack of specificity in the release is of itself, a ground for reversal separate and independent from the failure to obtain EEOC supervision theory. The instant release is a very general, broad release. It makes no mention of ADEA rights or even statutory rights in general. There was no discussion between the parties of ADEA rights or

the meaning of the waiver thereof before the release was executed.

Strand requires, for a valid release, that there be a "meeting of the minds," "with full understanding of the dispute and the effect of the compromise." The release in the instant case falls far short of these requirements.

The rule followed in Strand for a valid release of a Federal statutory right is in substance the same rule articulated by the Court in *Alexander vs. Gardner Denver Company,* 415 U.S. 36 (1974):

> "In this case, petitioner and respondent did not enter into a voluntary settlement *expressly* conditioned on a waiver of petitioner's cause of action under Title VII..."

at 52 n. 15 (emphasis ours).

Gardner-Denver requires that a waiver be *express.* The Sixth Circuit Court, in *Lyght vs. Ford Motor Company,* 643 F2d 435 (6th Cir. 1981) also required a "degree of specificity" in waiver forms, holding:

> "We agree with the 5th Circuit that waiver of a federal remedial right is not lightly to be inferred. It is clear in this case that petitioner (Lyght) and respondent (Ford) did not enter into a voluntary settlement *expressly conditioned* on a waiver of Petitioner's cause of action under Title VII."

at page 441.

In the instant case, *any* mention of ADEA rights is conspicuously absent from the release signed by Lancaster. Based upon the holdings in *Strand, Alexander vs. Gardner-Denver,* and *Lyght vs. Ford* this release should not be a bar to Lancaster's ADEA cause of action.

III. The Circumstances Under Which The Purported Waiver Was Taken From The Petitioner Raise A Fact Issue On Which The Petitioner Was Entitled To A Jury Trial.

The Release which the Respondent obtained was not from an arms length transaction between equally informed parties who have been allowed to become informed about any rights which are being released or extinguished, nor was it one in which the employee, an immigrant from England, a mechanic by training, was afforded a reasonable opportunity to consult counsel. But rather, the facts clearly indicate that the release was an ultimatum dictated by a party who was in a superior position, the employer, dealing with his employee, under circumstances where the employee was taken completely by suprise and denied the opportunity to have the documents in his possession overnight to review. Neither was the employee given a reasonable opportunity to consult independent counsel. He was shown the document only at the time he was asked to sign it. The document stated in part:

> "*You hereby release* the Company, it's officers and employees from each and *every claim of any kind* which you may have, or *hereinafter may have* resulting from your termination of employment by the company..." (emphasis ours)

Summary judgment against Lancaster's complaint or any of his claims is unwarranted. Summary judgment should only be rendered if there exists no genuine issue as to any material facts and Respondent is entitled to judgment as a matter of law. Rule 56(c), F.R.C.P. Such is not the case here. The pleadings, depositions, and all other papers on file in this case dispute Respondent's Conten-

tion that the waiver was willfully and knowingly given. In determining whether material factual disputes exist, facts and inferences should be veiwed most favorably to the non-moving party. *Aronsen v. Crown Zellerbach,* 662 F. 2d 584 (9th Cir. 1981).

In *Larson v. American Wheel and Brake, Inc.,* 610 F. 2d 506, (8th Cir. 1979) our appellant court has in the past stated the rule which is applicable to this case:

> "The purpose of a motion for summary judgment is to test the intrinsic merits of the case and to determine prior to trial whether, the parties have a real basis for relief or defense. Such motion is not a substitute for trial, and where the record, examined in the light most favorable to the nonmoving party, shows any material facts or factual inferences in dispute. *** summary judgment is inappropriate."

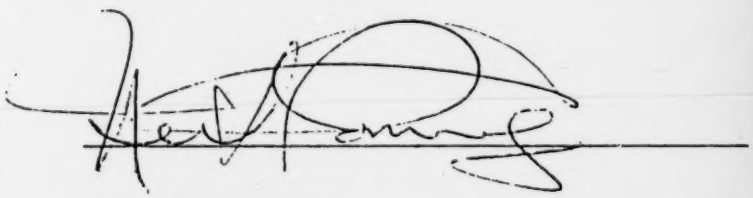
at 509.

Viewing the facts and inferences in a light most favorable to Lancaster, Summary Judgment should not have been granted by the trial court and the case should be allowed to go to trial before a jury to which the Petitioner is entitled as recognized by this Court in *Lorillard vs. Pons.*

Conclusion

Older employees in ever increasing numbers are being required to waive their statutory Federal Rights upon dismissal before reaching retirement. This Court is urged to settle the question of standards for their validity by granting Lancaster's petition for a Writ Of Certiorari.

Respectfully submitted,



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